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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

## No. 111

KEITH SANBORN, County Attorney of Sedgwick County, Kansas, and WILLIAM M. FERGUSON, Attorney General of the State of Kansas,
*Appellants,*

vs.

FRANK C. SKRUPA, Doing Business As "Credit Advisors",
*Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

## BRIEF OF APPELLANT KEITH SANBORN, COUNTY ATTORNEY OF SEDGWICK COUNTY, KANSAS

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## BRIEF OF APPELLANT KEITH SANBORN, COUNTY ATTORNEY OF SEDGWICK COUNTY, KANSAS

### OPINION BELOW

The opinion of the three-judge court below (R. 126-133) is reported in 210 F.Supp. 200 (D. Kan. 1961).

## JURISDICTION

The opinion of the three-judge court was rendered on November 27, 1961 (R. 126). Judgment pursuant to the opinion was entered on January 18, 1962 (R. 133). Appellants filed their notice of appeal on January 26, 1962 (R. 136). Order noting probable jurisdiction was entered by this Court on October 8, 1962 (R. 142). Appellate jurisdiction of this Court rests on 28 U. S. C., §1253.

## QUESTION PRESENTED

Whether L. 1961, Ch. 190, June 30, 1961 (G. S. Kan., 1961 Supp. 21-2464), prohibiting the business of "debt adjustment" in Kansas except as engaged in "incidentally in the lawful practice of law in this state", is constitutional as applied to appellee Frank C. Skrupa, a layman.

## STATUTE INVOLVED

The Kansas Debt Adjustment Act (L. 1961, Ch. 190, *supra*) reads:

> "AN ACT concerning the business of debt adjusting; making certain acts unlawful and prescribing penalties therefor.
>
> "*Be it enacted by the Legislature of the State of Kansas*:
>
> "Section 1. For the purpose of this act, 'debt adjusting' means the making of a contract, express [sic.] or implied with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business who shall for a consideration distribute the same among certain specified creditors in accordance with

a plan agreed upon. Whoever engages in the business of debt adjusting shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars ($500), or by imprisonment in the county jail not exceeding six (6) months, or by both such fine and imprisonment: Provided, That the provisions of this act shall not apply to those situations involving debt adjusting as herein defined incurred incidentally in the lawful practice of law in this state.

"Sec. 2. This act shall take effect and be in force from and after its publication in the statute book."

## STATEMENT

The suit below was filed June 27, 1961, by Frank Skrupa, a resident of Nebraska, who was engaged in the "debt adjustment" business in Wichita, Sedgwick County, Kansas (R. 1). Count I of the complaint sought an injunction against the Sedgwick County Attorney and against the Kansas Attorney General to prevent enforcement of the Kansas Debt Adjustment Act as violative of the due process, equal protection, and contract clauses of the federal constitution, and also as violative of Article 2, Section 16, of the Kansas constitution because the subject of the act was allegedly not clearly expressed in its title (R. 2). Count II sought a declaratory judgment regarding the act's alleged invalidity (R. 6).

The case was tried to a three-judge court in accordance with 28 U. S. C., §§2281 through 2284. The evidence established, inter alia, that neither Mr. Skrupa nor any of his employees were lawyers (R. 13); also, that on February 10, 1961, a state district court had denied Mr. Skrupa injunctive relief in part because his business "smacks of unauthorized practice of law" (R. 125). On November 27,

1961, by a two-to-one majority the three-judge court rendered an opinion holding the statute violative of the due process clause of the fourteenth amendment to the federal constitution (R. 126-132). Injunctive relief was awarded to plaintiff per the prayer of Count I of his complaint (R. 133-135).

## SUMMARY OF ARGUMENT

1. Even the majority opinion below concedes that:

> "Debt adjustment by its very nature may lend itself to great abuses and because of this the state has power to regulate it to the end that its citizens may not be overreached by unscrupulous persons. No doubt the state can . . . limit the business to certain classes of qualified persons." (R. 129-130).

Moreover, the services necessarily involved in "debt adjustment" constitute the practice of law. Finally, financially distressed debtors seeking relief via "debt adjustment" need competent legal advice as to the validity and priority of their creditors' claims and the comparative advantages and disadvantages of other available remedies (such as Chapter 13 of the bankruptcy laws), none of which counsel even a scrupulously honest layman is qualified to give. For any one or more of these three reasons the Kansas legislature was clearly entitled to prohibit laymen from engaging in the business of "debt adjusting".

2. Actually, the majority opinion below does not gainsay this conclusion. It neither holds nor suggests that the Kansas statute would not have been valid had it left the "debt adjustment" field open to licensed attorneys The premise of the decision below is its interpretation of "incurred incidentally in the lawful practice of law" as meaning that even lawyers may not confine their practice to

the business of "debt adjusting". This is an unreasonable interpretation of the statute which does *not* enact that a lawyer may adjust debts "only as an incident to a *case* which is otherwise before him" (R. 130; our italics) or specify that lawyers may conduct this business only as an incident of "the *general* practice of law" (R. 130; our emphasis). The statute says, merely, that lawyers may engage in this business "incidentally to the *lawful* practice of law in this state" (p. 3, *supra;* emphasis added). In other words, lawyers who are engaged in the lawful—not "general" but "lawful"—practice of law in Kansas may, as an incident of their lawful practice, engage in "debt adjustment". Nothing in the statute compels the conclusion that a lawyer may not devote as much of his time to this field as he deems advisable. As between these two possible interpretations, the court should adopt the one which upholds rather than the one which would invalidate the statute (*N. L. R. B.* v. *Jones & Laughlin Steel Corp., infra,* 301 U. S. at 30).

3. Even assuming, arguendo, that the lower court's interpretation of "incidentally to the lawful practice of law in this state" is correct, nevertheless the decision below is erroneous. The trial court held the statute invalid not because it prevents *laymen* from engaging in "debt adjusting", but because, as interpreted by the court, it prohibits *lawyers* from doing so (or, alternatively, unreasonably classifies those lawyers who may and those who may not). Appellee Skrupa, a *layman*, to whom the statutory prohibition is entirely proper, has no "standing" to complain that the statute is unconstitutional as applied to *lawyers* (*Collins* v. *Texas, infra,* 232 U. S. 288).

## ARGUMENT

We are in complete accord with and hereby approve and adopt the separate brief which appellant William M. Ferguson, Attorney General of the State of Kansas, is contemporaneously filing herein. The instant brief represents an attempt to supplement, without reiterating, the arguments and authorities contained in the Attorney General's brief.

### I.

### Prohibiting Laymen from Engaging in "Debt Adjustment" Is a Reasonable Exercise of State Police Power

Although the majority opinion below fallaciously *assumes* that "debt adjustment" constitutes a "lawful business", it nevertheless concedes that such business is ". . . affected by a public interest and because of its nature is subject to regulation by a state under its police powers" (R. 128). We submit that upon three distinct bases the legislature may properly deny to laymen the right to engage in this line of work.

#### (a) "Debt adjustment" is peculiarly susceptible to fraudulent practices by unscrupulous laymen.

The majority opinion below concedes that by its very nature "debt adjustment" lends itself to nefarious practices:

> "Debt adjustment by its very nature may lend itself to great abuses and because of this the state has power to regulate it to the end that its citizens may not be overreached by unscrupulous persons." (R. 129)

That "debt adjustment" as commonly practiced by "unscrupulous" laymen is inimical to the public welfare has been widely and uniformly recognized since at least 1955.

For example, see "Report of New York State Bar Association Committee on Unlawful Practice of the Law", *Unauthorized Practice News* (Dec. 1955),[1] page 63:

> "A nationwide scandal has been in the making the last several years from the mushrooming business variously called 'Debt adjustment service,' 'Debt pro-rating business,' 'Budget planning business,' 'Debt-lumping' and 'Debt pooling.'
>
> "Apparently the large cities are the scene of operations of this business, which has been described as 'an incredibly vicious racket,' by Boston's District Attorney Garrett H. Byrne." (p. 64)
>
> "Better Business Bureaus, Retail Credit Bureaus, and other commercial enterprises have been plagued with this very undesirable system, and have lent their aid and support to the various lawyer groups, Bar Associations and Legal Aid Associations throughout the country." (p. 64)
>
> "The publication 'Briefcase,' Vol. XII, No. 5, June 1955, published by the National Legal Aid Association, contains a very enlightening and thorough article on the operation, entitled 'Debt Adjustment—Meanest Racket Out,' by Murray Teigh Bloom." (p. 65)

At page 113 of this same December, 1955, issue of *Unauthorized Practice News*, the following appears:

> "Mr. [Thomas J.] Boodell, Chairman of the American Bar Association Committee on Unauthorized Practice of the Law, reported at the Northwest

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1. *Unauthorized Practice News* is published by The American Bar Association Committee on Unauthorized Practice of Law.

Regional Meeting and Deep South Regional Meeting of the American Bar Association on current activities of the committee. His remarks were as follows:

"'We wish to call to your attention what appears to be a "mean racket" as one writer called it. I refer to so-called debt adjustment companies—more often called "pro-rating," "lumping" or "debt-pooling" companies. In the past two years such slogans have lured thousands of desperate Americans and Canadians into a questionable scheme cleverly disguised as a sensible means of helping debt-ridden families pay all their obligations through one agency . . . Allen E. Bachman, Executive Vice-President of the Better Business Bureau, has said that these operations are well on their way of becoming a national scandal . . .'"

To much the same effect see the December, 1956, issue of *Unauthorized Practice News:*

". . . During recent months we have been corresponding with Mr. Dale Tooley of the University of Colorado School of Law. Mr. Tooley has been making an exhaustive study of the subject and recently sent us a copy of a paper entitled 'Colorado Should Outlaw Debt Adjusters.'

"We were strongly tempted to print it in full because it is such an excellent study but since it is some 27 pages in length we must content ourselves with a digest of its more salient portions.

"In the introduction to this paper, Mr. Tooley refers to quotations terming the debt adjustment business as 'the meanest racket out' and as 'an incredibly vicious racket.'" (p. 29)

"While Mr. Tooley's paper is of nation-wide interest, its initial purpose was to explore the question of whether or not the state of Colorado should outlaw debt adjusters, and he reaches the conclusion that the Colorado legislature should have no hesitancy in

taking such steps and that quick action would prevent more adjusters from moving into the state as they are now threatening to do." (p. 32)

Volume 10 of *Personal Finance Law Quarterly Report* (Spring, 1956), contains a comprehensive report by the Honorable Jacob K. Javits, then Attorney General of the State of New York, regarding a newly enacted statute prohibiting the practice of "debt adjustment" in that state except by attorneys, portions of which report are as follows:

"After a thoroughgoing study of debt pooling activities in New York State over a period of almost one year by my office and other agencies, the Legislature enacted a bill to prohibit the business in the State of New York. As a matter of basic policy I am opposed to outlawing any business, yet my office could suggest to the Legislature no practical way to regulate properly such activities." (p. 36)

"Governor Averell Harriman signed the bill on February 27, 1956, and it became effective immediately. (Chapter 31, Laws 1956). In signing this act to amend the penal law in relation to debt pooling plans, the Governor issued a strong supporting statement in which he said 'I have been informed by the Better Business Bureau of New York City "that there has been substantial justified complaint about the practices of some of the companies engaged in budget planning".' The Governor also mentioned the report of my office to him in which various types of abuses had been pointed out. He then went on to say:

" 'It appears that these practices are so common and widespread in the area affected, that the only feasible way to control them is by prohibiting this type of business with the exception already noted. (The exception is that debt pooling is authorized as a practice of l w.)

" 'There is no absolute right to engage in a business that conflicts with the public interest. In my

opinion "budget planning," as defined in this bill, is such a business.

> "'This bill has the approval of the Better Business Bureau, United Neighborhood Houses, New York Citizens Council, National Legal Aid Association, Brooklyn Bureau of Social Services, Conference of Personal Finance Law, the Empire State Chamber of Commerce, The New York State Bar Association, the Special Assistant to the Governor on Consumer Problems, the Banking Department and many other reliable organizations.'" (p. 37)

To substantially the same effect is an article by Robert D. Abrahams, Esquire, Chief Counsel for the Legal Aid Society of Philadelphia, "Debt Pooling Now Criminal in Pennsylvania", published in 15 *Personal Finance Law Quarterly Report* (Fall, 1961), p. 119.

Articles in leading "lay" magazines unanimously confirm the foregoing professional view. Thus, see "Beware of 'Debt-Adjustment' Racketeers", *Reader's Digest* (Oct. 1955), page 51; "Warning: The Debt 'Adjusters' Are Back!", *Good Housekeeping* (Feb. 1959), page 121; and "Debt Pooling: How Not to Get Out of Debt", *Coronet* (Oct. 1961), page 155. See, too, the official statement issued February 21, 1961, by the AFL-CIO Executive Committee (reproduced in 15 *Personal Finance Law Quarterly Report*, Summer, 1961, p. 88), which, after summarizing various problems incident to "debt adjusting" by laymen, concludes:

> "The AFL-CIO, therefore, is of the view that the debt adjustment business, regulated or unregulated, is not economically or socially desirable as a commercial activity, and should be eliminated."

At least two courts have squarely proclaimed the distinction between "debt adjustment" as practiced, on the one

hand, by lawyers who cannot advertise and are subject to the ethical standards and discipline of their profession, and, on the other hand, as engaged in by laymen who solicit the business of distressed debtors through extravagant advertisements and who are exempt from the restraints of professional ethics: *American Budget Corp.* v. *Furman*, 67 N. J. Super. 134, 170 A. 2d 63, 68 (Ch. Div. 1961), *aff'd per curiam*, 36 N. J. 129, 175 A. 2d 622 (1961), and *Home Budget Service* v. *Boston Bar Association*, 235 Mass. 228, 139 N. E. 2d 387, 390 (1957). Both decisions uphold as constitutional statutes prohibiting laymen from engaging in the business of "debt adjustment".

**(b) "Debt adjustment" is an integral and traditional aspect of the practice of law. Moreover, financially embarrassed citizens require "debt adjustment" services and advice of a type which no layman is qualified to furnish.**

We submit that the majority opinion below erred in its basic hypothesis that the sole object sought to be attained by the present Kansas statute was to ". . . protect those in financial distress *from exploitation by unscrupulous and dishonest operators*" (R. 130, our emphasis; Cf. R. 129). It is reasonable to assume that the Kansas legislature also considered that "debt adjustment" necessarily entailed the practice of law which perforce no layman, however honest, may undertake—or/and that financially distressed debtors require "debt adjustment" services and advice which no layman, again however honest, can possibly supply. Either of these premises supplies undeniable justification for a statute prohibiting "debt adjusting" by any person who is not a licensed attorney.

This Court judicially knows that "debt adjustment" is a legal service which has traditionally been performed by lawyers, a fact which is recognized by the New Jersey

court in *American Budget Corp.* v. *Furman*, *supra*, 170 A. 2d at 68:

> ". . . services encompassed by the statutory definition of debt adjuster are often an integral and essential part of an attorney's job when he represents a debt-ridden client."

In this same connection, see "The Lawyer and the Social Worker", a printed brochure published in 1959 by Family Service Association of America.[2] This booklet is addressed entirely to the problem of cooperation between lawyers and social workers. It evinces no awareness of or concern with the problems involved in the instant appeal and constitutes an entirely neutral, unbiased authority. It is, then, significant that this publication recognizes "debt adjustment" as an important segment of ordinary legal practice. In fact, "debt adjustment" is singled out as one of three principal areas (the other two being "marital conflict" and "adoption") in which cooperation between social workers and lawyers is especially important:

> "Debt adjustment is another pressing problem which besets many families who come to social agencies for help. . . . A lawyer can often give invaluable help to families who are willing to do their best under guidance to extricate themselves from a destructive burden of debt. This is another area, then, in which lawyer and caseworker can pool their useful services in shoring up imperiled family life." (pp. 22-24).

Numerous articles in *Unauthorized Practice News* (including those cited *supra*) published by the American Bar Association Committee on Unauthorized Practice of the Law discuss "debt adjustment" as a deplorable instance of unauthorized legal services by laymen. For example,

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2. 215 Fourth Avenue, New York 3, N. Y.

the "Report of New York State Bar Association Committee on Unlawful Practice of the Law", *Unauthorized Practice News* (Dec. 1955), pages 63-68, concludes:

> "NOW IS THE TIME TO DESTROY THIS VICIOUS SYSTEM OF UNLAWFUL PRACTICE OF LAW IN ITS INCEPTION.
>
> "VIGILANCE DEMANDS THAT THE LAWYERS NOT SLEEP ON THIS SUBJECT, AS WE HAVE IN SO MANY OTHER FIELDS WHICH HAVE BEEN APPROPRIATED BY LAYMEN.
>
> "LET US OUTLAW THE DEBT ADJUSTMENT SERVICE, BY WHATEVER NAME CALLED, AS AN APPROPRIATE STATUTE TO BE PRESENTED TO THE NEXT LEGISLATURE OF THE STATE OF NEW YORK WHICH DESCRIBES IT AS 'UNLAWFUL PRACTICE OF LAW' IN PLAIN TERMS.
>
> "PUBLIC OPINION AND PUBLIC WELFARE DEMANDS IT. JUSTICE REQUIRES IT."

See, also, "Illinois Bar Counsel Reports on 1957 Legislation", by Richard B. Allen, Esquire, counsel for the Illinois State Bar Association, *Unauthorized Practice News* (Sept. 1957), at pages 9-10:

> "Of course the matter cuts much deeper than whether debt-pooling activity should be regulated by the state. The crux is whether debt-pooling, albeit dressed up with the title of 'financial planning and management service,' entails the practice of law, and, if so, whether the legislature can thus regulate who may engage in such activity. It is axiomatic that each state determines for itself what constitutes the practice of law. The norms are ordinarily found in case law and often in statute. Is debt-pooling the practice of law *per se*? The closest approaches to this are a 1957 decision by the Supreme Judicial Court of Massachusetts and an opinion of the Attorney General of

Illinois [both of which give affirmative answers to Mr. Allen's rhetorical question]."

And see Tooley, "Should Debt Adjusters Be Outlawed?", *Unauthorized Practice News* (Dec. 1956), 29. At page 31 of this article the author points out that:

> "Massachusetts, Virginia and the Province of Quebec have passed statutes specifically outlawing the business or debt adjustment as the unauthorized practice of law."

The Massachusetts statute has been upheld as constitutional by the Massachusetts Supreme Court: *Home Budget Service* v. *Boston Bar Association, supra,* 139 N. E. 2d 387 (Mass. 1957). *In re Pilini,* 122 Vt. 385, 173 A. 2d 828 (1961), held, without the benefit of any statute whatever, that "debt adjusting" by a layman constituted the unauthorized practice of law. Inter alia the court observed:

> "A well founded criticism of debt pooling appears to be that a debt pooler owes his undivided loyalty to the debtor who retains his services and he cannot therefore at the same time properly be an agent for creditors. He cannot serve two masters." (173 A. 2d at 830)

> "We have no statute in this State governing debt pooling plans. Statutes may aid by providing machinery and criminal penalties governing certain business activities, but may not extend the privilege of practicing law to persons not admitted to practice by this Court. *The latent danger in such a program is that there is such a strong likelihood of legal service or advice being involved where debtors find themselves in financial difficulties,* or are defendants in various types of litigation, *and then seek assistance from a debt pooler,* as was done in this case." (173 A. 2d at 830; our emphasis)

See, too, *American Budget Corp.* v. *Furman, supra,* 170 A. 2d at 68 (N.J. Super. 1961):

> "It is plain by now that in their activities debt adjusters may encroach upon the practice of law."

With respect to the State of Kansas, in *Depew* v. *Wichita Association of Credit Men,* 142 Kan. 403, 49 P. 2d 1041 (1935), *cert. den.* 297 U. S. 710, 80 L. ed. 997 (1936), the trial court's "Finding VI" (142 Kan. at 409, 49 P. 2d at 1045) covers a factual situation analogous to "debt adjusting" as defined in the present Kansas statute. The Supreme Court held that activities of this type constitute the unauthorized practice of law (142 Kan. at 410, 49 P. 2d at 1045).[3]

In Kansas, as in most states, "The practice of law also includes the giving of advice or rendering services requiring the use of legal skill and knowledge . . ." (*Depew* v. *Wichita Association of Credit Men, supra,* 142 Kan. at 412, 49 P. 2d at 1046-1047), which definition aptly describes the type of services necessarily involved in "debt adjustment". See, too, the opinion rendered by the District Court of Sedgwick County, Kansas, on February 10, 1961, in Case No. B-6975, *Frank C. Skrupa* v. *Gordon Oliver* (R. 124-126), wherein instant appellee was plaintiff: "I am of the opinion that the plaintiff's business as conducted here in Wichita smacks of unauthorized practice of law . . ." (R. 125). In addition, see "Debt Adjusting Prohibited in Kansas", 15 *Personal Finance Law Quarterly Report* (Summer, 1961), page 87, and "Prohibitory Debt Adjusting Law

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3. In the lower court, instant appellee sought to escape the *Depew* holding by referring to the terms of a *consent* decree entered in the *district* court *following* the Kansas Supreme Court opinion (R. 36-38). How this subsequent action by the litigants could affect the prior appellate court decision was not explained.

Declared Unconstitutional by Three Judge Federal Court in Kansas", 16 *Personal Finance Law Quarterly Report* (Spring, 1962), page 49. Both of these articles are written by Wilbur D. Geeding, Esquire, Chairman of the Committee on Unauthorized Practice of Law of the Wichita (Kansas) Bar Association, and both evince the committee's opinion, based upon extensive investigations, that "debt adjustment" by laymen constitutes the unauthorized practice of law in Kansas—a conclusion which is manifest from the intervening petition filed in the court below by Mr. Geeding and his committee (R. 44).

However, even assuming arguendo that "debt adjustment" as practiced by instant appellee, Mr. Skrupa, and by most other laymen, does not involve the rendition of any legal services whatever, the instant statute may nevertheless be sustained upon the premise that "no effective job of debt adjustment can be performed *without* rendering legal services" (*Unauthorized Practice News*, Dec. 1956, at page 31; italics added). In this connection, see *Home Budgeting Service* v. *Boston Bar Associations, supra,* 139 N.E.2d at 390 (Mass.):

> "That the debt pooler neither enters the court room nor prepares legal documents does not save its conduct from classification as the practice of law. Nor is there escape in the fact that it does not advise as to the validity of claims; for, quite to the contrary, its omission to do so may be a surrender to some demands which a member of the bar perhaps ought to question and advise the debtor to contest. The debt pooler's plan and its administration thus exclude the debtor from skilled professional legal advice. So, where there is a conditional sale contract, the creditor may be paid, even in full, notwithstanding that there may have been no compliance with the applicable statutes. In this field the rules of law are most stringent, and the condition of the sale may be lost because of some

departure in the contract from the prescribed statutory language."

The Kansas legislature may—and should—reasonably have concluded that a financially distressed debtor seeking relief through "debt adjustment" needs competent *legal* advice regarding the validity and priority of his creditors' claims, the Kansas exemption laws, and the nature and comparative merits and disadvantages of the various remedies available to him—specifically including, although not limited to, a complete explanation of Chapter 13 of the federal bankruptcy laws which in nearly all instances affords considerably more efficacious relief than "debt adjustment".[4] See Allen, "Illinois Bar Counsel Reports on 1957 Legislation", *Unauthorized Practice News* (Sept. 1957), at page 7:

> "The debt-poolers' emergence to prominence, stimulated by an expanding consumer-credit economy and aided by extensive advertising, has concerned legislators and the bar for several years. In theory, debt-pooling performs a desirable social function: a person experienced in debt management consolidates a harassed debtor's obligations and through a budget system enables him to meet his obligations. In practice, however, the picture is vastly altered: a person with little or no training, not licensed to practice law and subject to no professional standards, through advertising which lures the hard-pressed debtor into believing that the debt-pooler can somehow retire obligations with the same amount of money the debtor has been unable to make go around, devises a payment plan for the debtor which involves the evaluation of claims and liens, the rights of the

4. "Debt Pooling Arrangements vs. Chapter XIII Proceedings", 46 *Ill. Bar Journal* 817 (June, 1958), by George R. Kennedy, Referee in Bankruptcy, U. S. District Court, Southern District of Illinois.

debtor under conditional sales contracts and advice on the debtor's legal rights. Because of the nature of the debt-pooler's clientele, the debt-plans frequently do not reach a conclusion, or if they do, the customer soon returns, after he has had a chance to create more debts, for another treatment. The only result accomplished for the debtor is the addition of another creditor, namely, the debt-pooler himself. There is provided by Chapter XIII of the Bankruptcy Act, moreover, an effective method by which a hard-pressed wage-earner may amortize his debts, coupled with the protection from creditors which is essential to make any debt-adjustment plan more than a mirage for the debtor. Neither under the present unlicensed debt-pooling operation, nor under the licensed system of H. B. 170, does the debtor have an effective adjustment plan unless at least creditors representing a large majority of his total debts accede to the plan. Under a Chapter XIII proceeding, the trustee's fee is 6% and the total cost to the debtor is probably less than he would pay for a debt-pooler's ineffective plan."

Accordingly, the Kansas legislature may have decided to prohibit "debt adjustment" by laymen, not merely to prevent the "unauthorized practice of law", but also to assure that all persons engaged in "debt adjusting" *do* practice law so that citizens who come to them for help will receive the type of advice and counsel they require.

By way of summary, the Kansas legislature may have enacted the instant prohibition against "debt adjusting" by laymen for any one or more of three distinct reasons: (1) "debt adjustment" is peculiarly susceptible to fraud and overreaching by unscrupulous laymen and therefore should be confined to lawyers whose profession precludes advertising and imposes rigid ethical standards; (2) "debt adjusting" necessarily constitutes the practice of law; and/or (3) financially distressed citizens are in dire need of "debt adjustment" advice of the type which no layman,

however honest, is qualified to furnish. It is, we submit, unarguable that such a prohibition may constitutionally be adopted by the state legislature in the exercise of its police power. In this connection, it is significant that one state in 1940, and, since 1955, sixteen additional states plus two Canadian provinces have enacted statutes proscribing (or, in a few instances, rigidly regulating) the practice of "debt adjustment" by laymen.[5]

II.

**That the Statutory Exemption Is Confined to "Debt Adjusting" Incident to the Practice of Law Affords No Justification for the Judgment Below.**

The majority opinion below concedes not only that "debt adjustment" is by its very nature subject to "great abuses", but also that:

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5. Cal. Financial Code, §§12200-12331 (1957); Florida Stats. Ann., §§559.10-559.13 (1959); Ga. Code Ann., §§84-3601 to 84-3603 (1956); Ill. Ann. Stats., C. 16-1/2, §§251-272 (1957); G. S. Kan., 1961 Supp., 21-2464 (L. 1961, Ch. 190); Maine Stats. Ann., 1961 Supp., Ch. 137, §§51-53 (1955); Mass. Ann. Laws, Ch. 221, §46c (1955); 17 Mich. Ann. Stats. (Supp.), §23.630 (Act No. 135, Laws 1961, p. 171); Minn. Stats. Ann., §§332.04-332.11 (1940); 2A N. J. Stats. Ann., §§99a-1 to 99A-4 (1960); New York, McKinney's Consol. Laws Ann., Penal Law, Art. 39, §§410-412 (1956); 24 Okla. Stats. Ann., §§15-18 (1957); Ohio Rev. Code Ann., §§4710.01-4710.99 (1958); 24 Okla. Stats. Ann., §§14-18 (1957); 18 Purdon Penn. Stats. Ann., Crimes & Punishment, 1961 Supp., §4899—a statute enacted subsequently to the one declared unconstitutional in *Commonwealth* v. *Stone*, 191 Pa. Super. 117, 155 A. 2d 453 (1959); Va. Code, §54-44.1 (1956); West Va., 1960 Supp. to Code Ann., §6112(4) (1957); Wyo. Stats. Ann., §§33-190 to 33-192. In the limited time available to us in preparing this brief we have been unable to locate official citations to the Quebec statute prohibiting "debt adjusting" by laymen as the unauthorized practice of law, or to the Ontario statute severely regulating this business. However, see references to the Quebec statute in the Dec., 1956, issue of *Unauthorized Practice News*, p. 31, and to both the Quebec and Ontario statutes in 10 *Personal Finance Law Quarterly Report* (Spring—1956), p. 38.

". . . because of this the state has power to regulate it . . . No doubt, the state can, by proper regulations, set up standards and qualifications, *and even limit the business to certain classes of qualified persons.*" (R. 129-130; Emphasis added)

However, the majority opinion construes the instant statute as prohibiting *anyone* from engaging in "debt adjustment" as a business (R. 131). This conclusion is posited upon its interpretation of the "incurred incidentally in the lawful practice of law" exception contained in the act:

"The only exception is that the 'act shall not apply to those situations involving debt adjusting as herein defined incurred incidentally in the lawful practice of law in this state.' This, in our opinion, is not regulation, or if it is, it is an unreasonable regulation. To say that a lawyer may adjust debts only as an incident to a *case* which is otherwise before him, is most unreasonable. If a lawyer, engaged in the regular practice of the law, concluded there was a greater field for him in devoting all his time to debt adjustment, rather than to the *general* practice of law, he could not discontinue his *general* practice and devote his full time to debt adjustment. He could not do so because he can adjust debts only as an incident to his general law practice. We conclude, first, that the act is prohibitory and not regulatory; and that it prohibits anyone from engaging in the business of debt adjustment. But even if the exception is considered as regulatory, it is an unreasonable regulation of a lawful business." (R. 130; Emphasis ours)

Thus, the majority opinion does not hold that the Kansas legislature may not legally prohibit laymen from engaging in "debt adjustment". Nor does it hold that the present statute would be void as prohibitory, or as unreasonably regulatory, if its exemption encompassed all

lawyers authorized to practice in Kansas. Per contra, the majority opinion is bottomed on the assumption that the statutory exemption is void *because it is limited to lawyers who devote less than all of their practice to "debt adjustment"*. This assumption is, we submit, fallacious.

As hereinbefore demonstrated "debt adjustment" *is* a normal, traditional phase or "incident" of law practice. The statute says nothing whatever about the right of an attorney to "adjust debts" only "as an incident *to a case which is otherwise before him*" (R. 130; our italics). Nor does it enact that he may do so only incidentally to the "general" practice of law (R. 130). Instead, the statutory language reads "incidentally in the *lawful* practice of law in this state" (our italics). A lawyer who devotes his entire time to the examination of abstracts, or to the trial of law suits, or to the preparation of wills and trusts, does so as an incident to the *lawful* practice of law. So, here, the statute should not be construed as implying that an attorney may spend 50 per cent, or 75 per cent, or even 99 per cent of his time "adjusting debts" for clients, but must not devote 100 per cent of his efforts to this field, especially when so strained an interpretation would raise numerous difficulties in enforcement. (Would a lawyer be in violation of the criminal statute if he devoted himself exclusively to "debt adjustment" for, say, one week, or one month, or one year?)

Bear in mind, too, that Canon 27 of the American Bar Association Canons of Professional Ethics recognizes only two exclusive "specialties"—admiralty and patent-trademark-copyright. Nor is "debt adjustment" a "specialty" which is recognized even informally by members of the bar. Unlike "antitrust law", "labor law", "corporation law", "taxation", and innumerable other branches of the profession, "debt adjustment" does not even command a "section"

of its own for American Bar Association members interested in the "debt adjustment" field.

In accordance with the settled principle that as between two possible interpretations the court will adopt the one which upholds rather than the one which would invalidate the statute (*N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30, 81 L. ed. 893, 908, 1937), we submit that "incidentally in the lawful practice of law" should not be accorded the unreasonably restricted meaning adopted by the majority opinion below.

But if, purely for purposes of argument, we assume that the lower court's interpretation of the statute is correct, we submit this affords no basis for granting injunctive relief herein to appellee Skrupa. The majority opinion below declares the statute unconstitutional not because it prevents *laymen* from engaging in the business of "debt adjustment", but solely because it prohibits *lawyers* from doing so, or, alternatively, because its classification of *lawyers* who may and *lawyers* who may not practice "debt adjustment" is unreasonable. Wherein is Mr. Skrupa, a *layman*, prejudiced by the fact that the statute may be unconstitutional *as applied to lawyers*? If, as has hereinbefore been demonstrated, the Kansas legislature may lawfully enact a statute barring all *laymen* from engaging in "debt adjustment" so long as the field is left open to lawyers, we submit that Mr. Skrupa has no "standing" to complain that the statute in controversy is unreasonably prohibitive or discriminatory *as to lawyers*. One to whom the application of a statute is constitutional may not maintain an attack against the statute on the ground that it is or may be unconstitutional as applied to others.[6]

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6. See *United States* v. *Raines*, 362 U. S. 17, 20-22, 4 L. ed. 524, 529-530 (1960), a leading authority on the so-called "stand-

## CONCLUSION

For the reasons and upon the authorities contained in the separate brief filed herein by appellant William M. Ferguson, as well as for the reasons and upon the authorities cited herein, we submit that the judgment of the three-judge court below is erroneous and should be reversed.

Respectfully submitted,

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ing" doctrine. See, also, *Collins* v. *Texas*, 223 U. S. 288, 56 L. ed. 439 (1912), holding that an osteopath could not successfully attack a statute limiting the practice of medicine to holders of university medical degrees merely because as applied to Christian Scientists the statute might be unconstitutional.